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[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J., POYSER, C.J. (F.M.S.) AND PEDLOW, J.

October 1, 1939.

LAI AH KAM AND ANOTHER v. REX.

[SINGAPORE CRIMINAL APPEAL No. 13 of 1939]

Criminal Procedure Code—Identification by means of photograph—admissible provided no prompting by Police.

When a crime has been committed there is no objection to a witness being shown by Police a number of photographs and being asked if he could recognise one as that of a wanted man who has been arrested. When the examination of a number of photographs is made to assist the Police to effect an arrest there is no objection to it provided that there has been no prompting and that nothing has been done by the police to suggest that a particular photograph may be that of a wanted man. It is otherwise when a photograph has been shown to a witness after arrest; and if that has been done it may be a ground for quashing a conviction.

CRIMINAL APPEAL.

First Appellant in person.

Storr, Crown Counsel for the Crown.

The judgment of the Court was delivered by

McElwaine, C. J.—We gave leave to appeal in this case on two points—the admissibility of a report made to the police, and the effect on the case of shewing to the Jury a photograph of the first appellant from a police album of photographs.

As to the first point, Ng Poh Eng went to report to the police about mid-day. Inspector Roberts at 12.05 was informed and at once proceeded to the scene of the robbery, the upstairs of No. 30 Upper Hokkien Street. It is presumed that this first information given by Ng Poh Eng was not at that time reduced to writing, if it was, it was not put in evidence. In any case it is clear that this report set the police investigation in motion. At 1.50 p.m. Inspector Roberts took a report or statement from another witness Gan Bee Neo and it was this report which was put in evidence.

Mr. Storr relied on section 119 of the Criminal Procedure Code as rendering the statement admissible. That section renders admissible copies of reports or information given under Section 117 or 118. But such copies are only admissible if the originals are admissible and are, equally with the originals, governed by section 124 which enacts that no statement made by *any* person to a police officer in the course of a police investigation shall be used as evidence save as in that section provided. None of the exceptions applies in this case and the report was a statement made to a police officer in the course of a police investigation and as such was inadmissible. But Mr. Storr suggested that if his argument as to its general admissibility was unsound it was admissible on another ground. Gan Bee Neo had given evidence of the articles which had been stolen and Mr. Storr informed us that her statement was put in to corroborate this portion of her evidence as the statement contained similar details of her stolen property. Section 158 of the Evidence Ordinance certainly refers to such a previous statement as corroborative, though it really only shews consistency. Section 158 is very general in its terms and taken by itself, would certainly admit a statement made to an investigating police officer. But Section 124 of the Criminal Procedure Code specifically excludes statements made to police officers. Further, the Criminal Procedure Code is the later enactment.

Without giving a final decision on this point, which was not very fully argued, and assuming that the statement could be used to corroborate the witness, we think that only so much of it as gave particulars of the stolen jewellery should have been admitted. At least one part of the statement did not corroborate Gan Bee Neo. We do not think, however, that the admission of this document caused any serious prejudice.

The second point affects only the first appellant. The witness Ng Poh Eng was asked whether certain stones shewn to her were like stones she had lost in the robbery. Q. "Are they anything like the stones —the same sized stones as in the locket?" A. "Yes." Q. "On the day of the robbery were you taken to the detective station?" A. "Yes." Q. "Were you shewn two books of photographs there?" A. "Yes." Q. "Did you pick out that photograph as being one of the people who came to your house?" A. "Yes." Then the photograph exhibit P. was shewn to the accused and to the jury.

Mr. Tremlett, Assistant Superintendent of Police, was asked Q. "Now in 1938 do you know if a photograph was taken of either of the accused?" A. "Yes,

a photograph was taken of the first accused in 1938." Q. "Is that P.7?" A. "Yes." P.7 is an obvious police photo of the first appellant's profile and side face and attached to the collar was a label 3900/38. The first accused was in fact convicted in 1938.

The purpose of this evidence was to shew that the coat the appellant was wearing in the photograph was identical with a coat found in a box in which were also found the stones about which Ng Poh Eng had been questioned. It cannot be said that Ng Poh Eng had identified those stones as her property, so proof of the coat being the property of this appellant proved nothing against him. As it was, the photograph was irrelevant to any issue before the jury, except as to the inadmissible matter of bad character. The prisoner did not give evidence of his good character. In *Rex. v. Dwyer* (1925) K.B. at p. 802. Lord Hewart L.C.J. said "These photographs having been handed to the jury, it was apparent to the jury that the prisoners had been previously convicted. It was just as clear a statement to the jury that the prisoners had been previously convicted as would have been sworn evidence to the effect." See too *Ernest Wainwright* 10 Cr. App. Rep. 52.

It was argued that the case against Lai Ah Kam was a strong one and that the proviso to section 6(1) of the Court of Criminal Appeal Ordinance authorised us to dismiss the appeal. The case was a fairly strong one. At an identification parade this appellant was pointed out by Ng Poh Eng and by Ng Huat Kee as one of the robbers.

On the date of the robbery which was some days before the arrest Ng Poh Eng picked out a photograph of the accused. There is no objection to a witness being shewn a number of photographs and being asked if she can recognise one as that of a wanted man who has not been arrested. The examination, without any prompting, of a number of photographs is in itself a kind of identification parade. When it is done to assist the police to effect an arrest, there is no objection to it provided nothing has been done by the police to suggest that a particular photo may be that of the wanted men—*R. v. Hinds* (1932) 2 K.B. p. 644. *R. v. Melany* 18 Cr. App. Rep. 2. It is otherwise when a photo has been shewn to a witness after arrest—*R. v. Haslam* 19 Cr. App. Rep. 59. *R. v. Gross* 17 Cr. App. Rep. 196. There is no suggestion that the photo was shewn to any witness after the arrest, so it does not appear that the action of the police in any way lessened the value of the identification at the parade.

The first appellant gave evidence and denied being guilty of the offence. No property identified as being part of the stolen property was found in his possession.

It is not sufficient to bring a case within the proviso that the case is strong when highly prejudicial evidence has been led by the Crown. In *Maxwell v. Director Public Prosecutions* (1935) A.C. p. 309. Lord Sankey said "It is impossible to deny that the evidence was strong against him. It is impossible to deny that he had to make very damaging admissions; but his case was that he had not in fact touched the deceased woman on this occasion, and that the seizure and collapse which immediately preceded her death took place when he in fact was in another room. It might well be that the fact that he had been charged some years before with a similar offence, although the charge led to an acquittal might have been the last ounce which turned the scale against him.

"If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the provisions of s.4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited."

The same principle was applied in *Palmer,* 25 Cr. App. Rep. 97. *Wadey,* 25 Cr. App. Rep. 104. *Sugarman,* 25 Cr. App. Rep. 109. *Peckham,* 25 Cr. App. Rep. 125. *Roberts,* 25 Cr. App. Rep. 158. *Firth,* 26 Cr. App. Rep. 148. *Cohen,* 26 Cr. App. Rep. 190. Such an irregularity can only be overlooked under the proviso when the Court considers that had the irregularity not occurred the jury must inevitably have arrived at the same verdict—*Williams,* 14 Cr. App. Rep. 135. *Wright,* 25 Cr. App. Rep. 35.

In this case it cannot safely be said that the jury, but for this prejudicial evidence, must inevitably have

believed the two witnesses who identified the first appellant and disbelieved the appellant and, following the cases cited (to which may be added *Lewis,* 14 Cr. App. Rep. 135) the conviction must be quashed.

The case against this appellant was, however, quite strong enough to justify the application of section 2 of the Court of Criminal Appeal (Amendment) Ordinance 1937—1938, and we order a new trial.

The appeal of the second appellant was dismissed and the hearing of the appeal of the first appellant is allowed and his conviction is quashed but a new trial must be had in his case.

New Trial Ordered.

[APPELLATE CRIMINAL JURISDICTION]

PEDLOW, J.

October 19, 1939.

OMAR ARIFFIN v. REX.

[SINGAPORE MAGISTRATE'S APPEAL No. 68 of 1939]

Police Force Ordinance Cap. 177—Section 26 (i).

When a charge against an accused is made under Section 26 (i) of the Police Force Ordinance, the offence charged being that of sleeping while on duty, it is unnecessary for the prosecution to prove mens rea. Imprisonment is a suitable punishment for this offence, at any rate in time of war.

MAGISTRATE'S APPEAL.

S. K. Das for Appellant.

E. N. Griffith-Jones, Crown Counsel for the Crown.

The facts sufficiently appear from the judgment below.

Pedlow, J. delivered an oral judgment as follows. In this case I feel I must confirm the conviction and sentence.

The accused has been found guilty of being asleep while on duty and the evidence is abundantly clear that he was asleep. The offence becomes more grave when it is realised that it occurred whilst a state of war existed. From the fact that a platform had been erected underneath the Kallang Bridge and that the accused and two other constables were stationed there to do nothing else but to keep watch on that bridge it must have been abundantly clear to the appellant that his duties were important. Normally in peace-time departmental action may have been sufficient. In the present instance the Police have sent the case to Court as the Court can impose heavier penalties and also a prosecution in Court will doubtless become known to all other members of the Police Force and be a warning.

Mr. Das for the appellant argued that the learned Magistrate had misdirected himself as to the question of the accused's alleged dizziness. I do not agree that that is so. There was nothing whatever to support the suggestion of the accused's being dizzy except his own statement made after he had been found fast asleep. In fact he did not then complain that he was dizzy. His complaint was that he had a pain in the back. The accused's position on the platform, lying down with his cap removed, is much more consistent with his having deliberately lain down, not perhaps for the express purpose of going to sleep but at any rate with a view to relaxing the utmost vigilance, than with any theory of dizziness. I think the learned Magistrate quite correctly rejected the suggestion that the accused's being asleep was due in any way to illness.

The second point made in accused's favour was that *mens rea* had to be proved. I do not accept this contention. To do so would make this section of the Ordinance quite meaningless. No element of *mens rea* has to be proved. The question is simply, was the accused asleep on duty or was he not asleep? If he was asleep he was guilty.

As to sentence, I say quite frankly had I been trying the case as a Magistrate I would not have imposed quite so heavy a sentence. I would, however, have inflicted imprisonment as a warning to all other Police officers of the seriousness of the offence. But I would have imposed the minimum period which in my opinion would have been sufficient to prevent a repetition of the offence and I think less than a month would have been sufficient, as it is the fact of imprisonment and not the length of time which is the great deterrent. A sentence of one month in this case is not in my opinion unreasonable. This is the first case of its kind during the present war and I cannot hold that the sentence is excessive. I am following the ruling of the Court of Appeal and am not going to "polish" it.

The conviction and sentence are confirmed.

Appeal dismissed.